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UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 750

September Term, 2000

HARFORD COUNTY, MARYLAND

v.

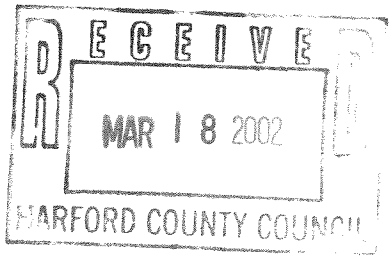
CHARLES B. ANDERSON

Davis,
Adkins,
Bloom, Theodore G.
(Retired, specially assigned),

JJ.

Opinion by Bloom, J.

Filed: March 6, 2002



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This case arises from the efforts of appellee, Charles B. Anderson, to seek rezoning of his property in Harford County from an R-1 (Urban Residential) to a B-3 (General Business) district. In a written decision dated July 28, 1998, Hearing Examiner William F. Casey denied Anderson's request for rezoning. On January 12, 1999, the Hearing Examiner's decision was reviewed and adopted by the County Council of Harford County sitting as the Board of Appeals. Anderson filed a petition for judicial review in the Circuit Court for Harford County. The circuit court reversed the decision of the Board of Appeals and remanded the case with directions to grant the rezoning requested by Anderson. This appeal followed.

ISSUES PRESENTED

On appeal, Harford County raises the following issues:

I. Is the definition of "neighborhood" as adopted by the Board of Appeals based upon substantial evidence?

II. Was the Board of Appeals' finding that B-3 is an inappropriate zone for the subject property based upon substantial evidence and sufficient to deny the requested rezoning?

FACTUAL BACKGROUND

Appellee is the owner of a parcel of land located at 1209 Old Mountain Road South in Joppa, Maryland. The parcel, consisting of 2.24 acres that is zoned R-1 (Urban Residential), is a corner lot

located between Old Mountain Road South and the new Maryland Route 152, approximately one-half mile from the Interstate 95 interchange at Route 152. The property is one-third of a mile from U.S. Route 40. It fronts on Route 152 and Old Mountain Road South and is improved with a house, a garage, and two outbuildings.

On March 2, 1998, Anderson filed a request for zoning reclassification, seeking to have the subject property rezoned from an R-1 to a B-3 (General Business) district. At the time the request for zoning reclassification was filed, the Land Use Plan Designation for Anderson's property was "Industrial/ Employment." Anderson sought to use the property for commercial purposes. Anderson maintained that there was a mistake as to the existing R-1 zoning. He claimed that R-1 zoning is not consistent with the Master Plan, and given the major highway improvements to Route 152, the residential character of the property has been severely affected. According to Anderson, at the time of the 1989 Comprehensive Rezoning, Harford County was aware of the proposed road improvements but failed to determine the appropriate classification for the subject property. Anderson maintained that, as part of the comprehensive rezoning process, Harford County should have rezoned the subject property to B-3 in order to make it consistent with the Master Plan and the neighborhood. In addition, Anderson asserted that there have been numerous changes in the neighborhood, since the 1989 Comprehensive Rezoning, that reflect

the increased commercialization of the neighborhood. Specifically, he noted an increase in traffic on the CSX Railroad located south of the subject property; the widening of Route 152; the installation of overhead transmission lines by the Baltimore Gas & Electric Company, which resulted in removal of a tree buffer; and plans to expand the existing railroad.

On May 18, 1998, an evidentiary hearing was held before the Harford County Zoning Hearing Examiner, William F. Casey. During the hearing, Anderson defined his neighborhood as bounded by Route 7, Route 40, Mountain Road South, and Clayton Road. He described changes in this neighborhood including: the widening of Route 152 into a dual highway; a new bridge on Route 152 across the CSX Railroad; a new High's store; the addition of Coale Trucking; the expansion of the Joppa-Magnolia Fire Company; the opening of a new nursery business; the rezoning of the Palmeri property (situated immediately adjacent to Anderson's property), which has received preliminary plan approval for use as a used car lot; and the enlargement of the Route 152 and Route 40 intersection. Anderson also testified that many of the properties on the east side of Route 152 are zoned B-3. He stated that a tremendous amount of vehicular noise is heard on his property from both Route 152 and the Maryland Redimix Concrete Plant, which is situated west of Anderson's property. Anderson testified that there is heavy commercial traffic on Old Mountain Road South from the Maryland

Redimix operation and Coale's trucking.

On cross-examination, Anderson testified that access to his property would be off Old Mountain Road South. He admitted that a request to rezone his property to B-3 was made at the time of the 1987 Comprehensive Rezoning and that the County Council denied the request.

Denis Canavan, an expert in the field of land use planning, also testified at the hearing. In Mr. Canavan's opinion, Anderson's neighborhood was defined as Old Mountain Road to the west, Interstate 95 to the north, Winters Run to the east, and U.S. Route 40 to the south. He stated that he had studied the Anderson property and that to rezone the property to a B-3 district would be consistent with the Master Land Use Plan because the Master Plan currently designates the parcel as "Industrial Employment." Canavan testified that, since 1989, there have been seven B-3 rezoning changes in the neighborhood including six properties that were rezoned from R-1 to B-3. Those seven Board of Appeals cases involved the following properties: Patel, Cummins and Guttermuth, Sohn, Palmeri, Ivanauskas, Miller, and High's of Baltimore. Mr. Canavan testified that these rezonings have several points in common:

> One, they are all in the subject neighborhood. Two, they all have frontage on new Route 152. They have all been requested to the B-3 classification, and they have all been approved since 1989. Some of the properties confront and some adjoin the subject property,

> but they are all within the neighborhood as defined previously, and they have all been approved by the County Council.

Mr. Canavan outlined various changes that have occurred in the neighborhood, in all of which various hearing examiners had, in the past, referred to certain changes in the vicinity that supported the recommended rezoning of the seven parcels. Among those changes discussed by Canavan were the overhead transmission lines by Baltimore Gas & Electric adjoining the CSX Railroad; road improvements to Route 152; removal of trees on the eastern side of Route 152; increased volume of CSX Railroad traffic; the construction of the High's store; a new communications tower on the B&O Railroad property; and, increased activity and noise at a nearby concrete plant.

Debra Laubech, a neighbor of the Anderson property, testified that she supported the rezoning request and that there have been extensive changes in the neighborhood including an increase in traffic and noise.

Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning, testified in opposition to Anderson's rezoning request. McClune actively participated in preparing the Department of Planning and Zoning's staff report for Anderson's rezoning request, in which the Department recommended denial of Anderson's request. According to McClune, the Department was concerned about increased strip development along Old Mountain Road

and that rezoning on a piecemeal basis to a B-3 district would defeat the purpose of the Industrial/Employment designation.

At the hearing, McClune summarized the Department's findings as follows:

> The subject property, as stated, is located in the southwest area of the development envelope and contains areas of low and high intensity land use designations.
>
> The subject property itself is designated as industrial employment, which is defined by the 1996 Land Use Element Plan as areas of concentrated manufacturing, distribution, technical research, office, and other activities generally located along the transportation corridor.
>
> The 1988 Land Use Plan had designated the subject property as industrial commercial. This land use category was defined in 1988 as areas of industrial park development, mixed commercial and industrial uses and general industrial activities generally located along major transportation corridors.
>
> During the preparation of the 1996 Master Plan and Land Use Element Plan, there was specific discussion regarding the designation of industrial employment rather than industrial commercial. The economic development goals within the industrial employment area were to promote employment opportunities in designated areas along major road networks. And these employment opportunities are hopeful that they would be higher-end employment opportunities.
>
> I think the keynote in that change there is that any emphasis or discussion about commercial activity was excluded from the industrial employment category.
>
> For purposes of defining the neighborhood for this request, the Department has defined

the neighborhood as that area to the north to 95, to the east to Clayton Road, to the south to Route 40, and to the west of Old Mountain Road.

And the Department in reviewing the 1997 comprehensive rezoning and 1996 Land Use Plan did a lot of work in reviewing areas and definitions of neighborhoods. And neighborhoods are defined by historical land uses, by perceptions of the people living there. I would note that the Applicant himself, a resident of the area, defined the neighborhood the same as we did for this case.

During the review process of the 1997 comprehensive rezoning, the Applicant had requested 2.24 acres to be rezoned from the existing R-1 urban residential classification to B-3, general business. It was recommended by the Department of Planning and Zoning, by the Planning Advisory Board and by the County Council to retain the R-1 zoning classification.

As the Applicant has stated, the County Council was aware of the planned improvements on Route 152 and considered that in the 1989 comprehensive review and in 1997. The courts have found that all lands within a particular classification and Land Use Plan may not be zoned for those uses initially. The Land Use Element Plan designation of industrial employment does not require immediate rezoning of a property.

In reviewing the request for conformance with the current Master Plan and the Land Use Element Plan, the Department found the following: The industrial employment land use designation is intended to concentrate manufacturing, distribution, technical, research and office activities in appropriate areas.

B-3 zoning requested would create additional strip commercial development along Maryland 152. Such strip commercial is not

consistent with the goals in the industrial employment category.

Coordinated redevelopment of this area is necessary to provide for the types of uses envisioned in this land use category. Piecemeal zoning changes for commercial development would not be consistent with the 1996 Land Use Element Plan.

The subject property is oriented towards Old Mountain Road South and not towards 152. The access, as stated, would be off of Old Mountain Road South. There remains a residential neighborhood along Old Mountain Road South which is not oriented towards 152. The encroachment of commercial zoning into this neighborhood could adversely affect these properties. Therefore, the Department recommends that the requested rezoning be denied.

Upon questioning by the Hearing Examiner, McClune testified that the most appropriate zoning for the subject property, at the present time, is R-1. McClune agreed that there "has definitely been a change in the area" and that there was no way that the County Council could have known that there would be seven piecemeal rezonings, a communications tower and a new bridge constructed since the last Comprehensive Rezoning. McClune acknowledged that, since 1989, the Department recommended approval of six or seven B-3 commercial rezonings and that a total of seven B-3 commercial rezonings have been approved by the Board of Appeals. According to McClune, the Department supported the rezoning applications for properties on the east side of Route 152, but did not support the application to rezone Anderson's property which is on the west side

of Route 152. McClune explained that, in 1996, there was a change in the land use policy by the County Council resulting in a change in the view of the area and the types of uses for it.

In addition to McClune and the other witnesses mentioned above, several citizens testified in opposition to the rezoning request.

On July 28, 1998, the Hearing Examiner issued a written decision recommending that Anderson's request to rezone his property be denied. The Hearing Examiner rejected Anderson's description of the "neighborhood," holding instead that "the 'neighborhood' reasonably within the immediate vicinity of the subject parcel is more accurately defined as being bordered by Route 7 to the north, Route 152 to the east, CSX rail to the south and Paul's Lane to the west." The Hearing Examiner determined that this smaller "neighborhood" was essentially residential in nature and free of commercial development, notwithstanding numerous changes over the years. The Hearing Examiner concluded that none of the changes identified during the hearing have resulted in a change in the character of the neighborhood that would warrant rezoning on that basis. The Hearing Examiner noted that, with only one exception, there has not been any construction begun with respect to the rezonings that have taken place. The Hearing Examiner concluded that "[t]he mere rezoning of undeveloped property does not in itself result in a change in the character of

the neighborhood." The Hearing Examiner denied Anderson's request for rezoning, finding that Anderson had failed to meet his burden of establishing that changes have occurred since the last comprehensive rezoning which resulted in a "change in the character of the neighborhood" sufficient to warrant a rezoning.

The Hearing Examiner also rejected Anderson's contention that a "'mistake' in the legal sense was made in 1989 because the County Council, at that time, could not have foreseen subsequently occurring events that would have rendered the initial premises upon which the zoning classification was determined to be invalid." The Hearing Examiner acknowledged that there have been subsequently occurring events in the neighborhood of which the 1989 County Council could not have been aware. He concluded, however, that the County Council was aware that the subject property is located on a major arterial road and is bisected by Route 152 and that the neighborhood would be subject to future commercialization. Notwithstanding these facts, the County Council took no action to rezone the property to a commercial designation in 1989. Moreover, after the 1997 Comprehensive Zoning Review, the County Council, aware of the changes in the neighborhood and surrounding vicinity, elected not to alter the R-1 zoning designation.

The Hearing Examiner further concluded that, even if the subsequently occurring events could be characterized as "mistakes," B-3 is not necessarily the most appropriate zoning classification

for the property. The Hearing Examiner concluded that this is an area that warrants extensive study and "what has been characterized as coordinated re-development."

Anderson filed a request for final argument before the County Council sitting as the Board of Appeals. A hearing was held before the Board of Appeals on December 15, 1998. On January 12, 1999, the Board adopted the Hearing Examiner's recommendation to deny the requested zoning reclassification.

Anderson subsequently filed a Petition for Judicial Review in the Circuit Court for Harford County. After oral arguments, the circuit court issued a Memorandum Opinion and Order reversing the Board's decision and remanding the matter with directions to grant the requested rezoning. In reaching its decision, the circuit court found that the undisputed evidence from the expert witnesses and Anderson established neighborhood boundaries that were more expansive than those delineated by the Hearing Examiner. The circuit court concluded that the Hearing Examiner's conclusion was supported by the testimony of only a single witness. Moreover, the circuit court concluded that the evidence supported Anderson's argument that there had been a change in the character of the neighborhood since the last comprehensive rezoning. The court held, therefore, that the Board acted arbitrarily and capriciously in adopting the findings of the Hearing Examiner, because the Hearing Examiner's factual findings were not supported by

substantial evidence. According to the circuit court, a reasonable mind, presented with the same evidence as the Hearing Examiner, could not have reached the same conclusion. Finding that the Board's decision was "not fairly debatable," the circuit court reversed the Board's findings. In light of its decision that there was a change in the character of the neighborhood, the circuit court did not address Anderson's contention that there was a mistake in the 1989 Comprehensive Rezoning.

STANDARD OF REVIEW

Our role in reviewing the decision of an administrative agency "'is essentially to repeat the task for the circuit court; that is, to be certain the circuit court did not err in its review.'" *Eastern Outdoor Adver. Co. v. Mayor & City Council of Baltimore*, 128 Md. App. 494, 515 (1999), *cert. denied*, 358 Md. 163 (2000) (quoting *Red Roof Inns, Inc. v. People's Counsel for Baltimore City*, 96 Md. App. 219, 224 (1993)(citing *Art Wood Enters. v. Wiseburg Community Ass'n*, 88 Md. App. 723, 728 (1992))). Our role is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. *Eastern Outdoor Adver. Co.*, 128 Md. App. at 514.

We apply different standards of review to the agency's legal

and factual findings. When reviewing an agency's legal conclusions, we must determine whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law. *Id.* See also *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 652 (1997)(quoting *Lee v. Maryland Nat'l Capital Park & Planning Comm'n*, 107 Md. App. 486, 492 (1995)). When reviewing findings of fact and conclusions regarding mixed questions of law and fact, however, deference will be given to the agency's findings and we cannot substitute our judgment for that of the agency. We must accept the agency's conclusions if they are based on substantial evidence and if reasoning minds could reach the same conclusion based on the record. *Eastern Outdoor Adver. Co.*, 128 Md. App. at 514-15 (and cases cited therein); *Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 120 Md. App. 444, 465 (1998), *vacated in part*, 352 Md. 645, 724 (1999). If there is no substantial or sufficient evidence to support the factual findings of the Board, the Board's decision will be reversed because it was arbitrary and illegal. *Eastern Outdoor Adver. Co.*, 128 Md. App. at 515 (citing *Mossburg v. Montgomery County*, 107 Md. App. 1, 30 (1995)).

DISCUSSION

I.

Harford County contends that the circuit court's decision to reverse and remand was erroneous because the definition of "neighborhood," as adopted by the Board of Appeals, was based upon substantial evidence. Anderson disagrees, arguing that the definition of "neighborhood" adopted by the Board of Appeals was unduly restrictive, not based on the evidence presented, and inconsistent with the definition of "neighborhood" adopted in seven previously approved B-3 rezoning cases involving properties near the subject property. According to Anderson, "It is illogical to conclude that all property on the east side of Maryland Route 152 is situated in another neighborhood when such property is directly opposite the Anderson tract."

We agree with appellant that the finding of the Board, which adopted the recommended decision of the Hearing Examiner, was based upon substantial evidence. As we have explained in prior opinions, the substantial evidence standard applicable to a Board's findings of fact and resolution of mixed questions of law and fact, sometimes referred to as the "fairly debatable" test, is implicated by our assessment of whether the record before the Board contained at least "a little more than a scintilla of evidence" to support the Board's scrutinized action. If such substantial evidence exists, even if we would not have reached the same conclusions as

the Board based on all the evidence, we must affirm. See *Friends of the Ridge*, 120 Md. App. at 466.

In reversing the Board of Appeals' decision and rejecting its definition of "neighborhood" as being too narrowly drawn, the circuit court itself recognized that at least one neighbor gave evidence to support the Board's finding. The circuit court determined that "[t]here was no evidence to support the Hearing Examiner's conclusion **other than the view of one neighbor.**" While we might not have reached the same conclusion as the hearing examiner, it is clear that the Hearing Examiner and, therefore, the Board, which adopted his findings, had sufficient evidence to redefine the neighborhood. The testimony of that one neighbor was enough.

Moreover, the record clearly reflects that there was additional evidence to support the Hearing Examiner's definition of the neighborhood. The Hearing Examiner specifically stated that his narrow definition of the neighborhood was based upon "the maps included with the file and the testimony of the various witnesses, both for and against the request." The evidence presented to the Hearing Examiner included testimony that the community in which they lived consisted almost entirely of residential homes abutting Old Mountain Road. The evidence also demonstrated that Route 152 is a major thoroughfare that is now, not unreasonably, recast as a natural border between the residential area on the one side and the

commercial properties on the other. The testimony of Mr. McClune lends further support to the finding of the Hearing Examiner. McClune, who participated in the preparation of the Staff Report which found a neighborhood similar to that suggested by Anderson, also testified that "[t]here remains a residential neighborhood along Old Mountain Road South which is not oriented towards 152." Certainly, there was substantial evidence to support the Hearing Examiner's decision. The trial judge was not free to substitute his views for those of the Hearing Examiner and Board.

II.

According to the circuit court, the Hearing Examiner's determination that Anderson failed to prove a change in the character of the neighborhood was not supported by substantial evidence. This holding ignores a distinction made clear in *Starke v. Starke*, 134 Md. App. 663 (2000), wherein Judge Moylan discussed the difference between a finding of fact by a judge in a non-jury case and a "non-finding" of a fact that has to be proved by a proponent in order to prevail. Judge Moylan began his analysis in *Starke* "with the recognition that the non-finding of a given proposition by no means necessarily implies the finding of its opposite, despite a common tendency to think that it does." *Starke*, 134 Md. App. at 681.

The *Starke* case involved a claim by a mother, the appellant,

that a confidential relationship existed between herself and her son, the appellee. On appeal, the mother asserted that the trial court committed clear error in finding that no confidential relationship existed. In affirming the trial court's decision, we held that the mother failed to carry her burden of persuading the trial judge that a confidential relationship existed between her and her son. In discussing the distinction between persuasion and non-persuasion, Judge Moylan wrote:

> [I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded. Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent). There are with reasonable frequency reversible errors in those regards. Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.

Starke, 134 Md. at 680-81.

In the case *sub judice*, the burden was on Anderson to establish a change in conditions which resulted in a change in the character of the neighborhood. *Clayman v. Prince George's County*, 266 Md. 409, 417-18 (1972)(and cases cited therein); *Montgomery v. Board of County Comm'rs for Prince Geoerge's County*, 256 Md. 597, 602 (1970). This burden of proof is quite onerous. There is a

strong presumption that the original zoning and comprehensive rezoning are correct. To sustain a piecemeal change therefrom, there must be produced strong evidence of mistake in the original zoning or comprehensive rezoning or else evidence of substantial change in the character of the neighborhood. *Clayman v. Prince George's County*, 266 Md. 409, 417 (1972)(and cases cited therein); *Montgomery v. Board of County Comm'rs for Prince George's County*, 256 Md. 597, 602 (1970).

While Anderson and other witnesses presented testimony of changes within the neighborhood, there was no evidence that the alleged changes affected the character of the neighborhood as defined by the Hearing Examiner and, ultimately, the Board of Appeals. Much of Anderson's argument was based on the prior rezonings in the neighborhood as he defined it. The Hearing Examiner did not err in concluding that those prior rezonings do not suffice to effect a change in the character of the neighborhood as defined by him. The rezonings were, in effect, paper changes, since only one of the seven properties that were previously rezoned had been developed. See *Plant v. Board of County Comm'rs for Prince George's County*, 262 Md. 120, 123 (1971)(rezoning of adjacent property does not require rezoning of the subject property). Moreover, McClune testified that the appropriate zoning category for the subject property was R-1. The Report of the Planning Staff recommended against the rezoning request stating

that "[t]he B-3 zoning requested would create additional strip commercial development along Md. 152 [that would be inconsistent] with the goals of job creation in the Industrial/Employment category."

Simply stated, Anderson failed to meet his burden of proof to the satisfaction of the fact-finder. This failure to meet the burden of proof is not equivalent to a finding of any contrary fact. As with the determination of the boundaries of the neighborhood, the finding that there had not been changes that affected the character of the neighborhood was supported by substantial evidence and was fairly debatable. The decision was neither arbitrary nor capricious and should have been upheld.

JUDGMENT REVERSED.

COSTS TO BE PAID BY APPELLEE.